RECENT DECISIONS.

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ADMIRALTY—LIMITATION OF LIABILITY—PERSONS ENTITLED.—A British vessel, after collision with an iceberg, foundered in mid-ocean. *Held,* the owner could obtain no limitation of liability under U. S. Rev. Stat. § 4282 *et seq.* *The Titanic* (D. C. S. D. N. Y. 1913) 209 Fed. 501.

Since the general maritime law of Europe has no inherent force in the United States, *The Lottowanna* (1874) 21 Wall. 558, the availability of proceedings to limit liability must depend upon the terms of Rev. Stat. § 4282, which should *prima facie* have no extra-territorial effect. *Churchill* v. *Ship British America* (D. C. 1878) 9 Ben. 516; see *In re Garnett* (1891) 141 U. S. 1. This construction, however, while adopted under a former English statute of this kind, *Cope* v. *Doherty* (1858) 2 DeG. & J. *614; *The Wild Ranger* (1862) Lush. Adm. 553, has not prevailed in the United States in actions arising from a tort committed upon the high seas, on the theory that the body of United States maritime law, whether statutory or otherwise, should be applied unless the foreign law was shown to be different. See *The Scotland* (1881) 105 U. S. 24; *Thommassen* v. *Whitwell* (C. C. 1882) 12 Fed. 891, affirmed 118 U. S. 520; *cf. La Bourgogne* (1908) 210 U. S. 95. It is but just, however, that when contesting vessels belong to the same foreign nation, or nations recognizing the same rule as to the question involved, their law rather than that of the forum should be applied, *The Scotland, supra;* see *The Belgenland* (1885) 114 U. S. 355, either on the theory that the delinquent ship is territory and its law therefore *loci delicti,* or that a defendant need in that case be subject to no obligation not imposed by his local law. Westlake, Private International Law (5th Ed.) § 202. The decision of the principal case, therefore, as making possible the application of the law of the foreign ship, not only recognizes the desirability of a strict construction, but inflicts injustice on neither of the parties.

ATTORNEY AND CLIENT—DISBARMENT FOR CRIME BEFORE CONVICTION.—In a proceeding to disbar an attorney accused of a felony, *held,* the court was bound by a statute not to disbar the attorney until he was convicted of the crime. *State* v. *Reynolds* (Mo. 1913) 158 S. W. 671.

It is generally conceded that the right to practice law, instead of being property which cannot be taken without due process of law, is a mere privilege or franchise, *Cohen* v. *Wright* (1863) 22 Cal. 297; *In re Thatcher* (D. C. 1911) 190 Fed. 969; *contra, Ex parte Steinman & Hensel* (1880) 95 Pa. 220, which the court has inherent power to revoke. See *Beene* v. *State* (1860) 22 Ark. *149. Nor does such disbarment usurp the function of the criminal court by punishing the attorney for a crime. The court is rather determining whether a man whom it has formerly licensed and held out to the world as of high moral character is still worthy of that confidence. See *State* v. *Winton* (1884) 11 Ore. 456; *State* v. *McClaugherty* (1889) 33 W. Va. 250; but see dissent of Field, J., in *Ex parte Wall* (1882) 107 U. S. 265, 301. Consequently, although it is frequently said that an attorney should

not be disbarred before conviction except in extraordinary circumstances, *Ex parte Wall, supra,* yet it seems that he should be disbarred for any offense which shows him unworthy of the court's recommendation, irrespective of whether he has actually been convicted before a jury, *In re Smith* (1906) 73 Kan. 743, or of whether the offense is even indictable. *In Matter of Mills* (1850) 1 Mich. 392. Accordingly, it seems that where a statute merely enumerates grounds for which an attorney may be disbarred, the court should not be precluded from withdrawing its recommendation for other reasons which show the attorney to be untrustworthy. *Delano's Case* (1876) 58 N. H. 5; *In re Smith, supra; contra, In re Eaton* (1895) 4 N. Dak. 514. But where, as in the principal case, the statute provides that an attorney may be disbarred only under certain circumstances, the court seems correct in holding that it cannot disbar under any other circumstances, *In re Ebbs* (1908) 150 N. C. 44, despite the fact that such statutes are often attacked as being an unwarranted attempt by the legislature to interfere with the working of a co-ordinate branch of the government. See dissent in *In re Ebbs, supra.*

AWARD AND ARBITRATION—JUDICIAL ACTS INVOLVED.—The hearing of a board of arbitrators was held on Sunday, but the award was published the following day. *Held,* the award is valid as the only judicial acts were consummated on Monday when the award was published. *Karapchinsky* v. *Rothbaum* (Mo. 1914) 163 S. W. 290.

There seems to be little unanimity of opinion in the various jurisdictions as to what parts, if any, of the proceedings in an arbitration and award constitute judicial acts. It has been held that the publication of an award involves a judicial act. *Story* v. *Elliot* (N. Y. 1827) 8 Cow. 27. But as arbitrators are not bound to follow strictly legal rules in the hearing, Morse, Arbitration and Award, 135, or in arriving at their decision, *ibid.* p. 217, the hearing and the drawing up and signing the award are not such judicial acts. *Isaacs* v. *Beth Hamedash Society* (N. Y. 1857) 1 Hilt. 469. On the other hand, the publication of an award has been declared only a ministerial act connected with a judicial proceeding, *Kiger* v. *Coates* (1862) 18 Ind. 153, and in some jurisdictions it is held that no judicial acts are involved, the award being merely the consummation of a contract. *Blood* v. *Bates* (1858) 31 Vt. 147. The award is final as to the law and fact of the matter in controversy, *Boston Water Power Co.* v. *Gray* (Mass. 1843) 6 Metc. 131, and hence its making is correctly considered a judicial act. But as the decision of the arbitrator is revocable up to the time of its publication, see *Eveleth* v. *Chase* (1821) 17 Mass. 458, 460, the actual making of the award must be co-incident with its publication. Therefore, in the principal case it is immaterial whether the decision of the arbitrators was reached on Sunday or not, since the making of the award, which is the judicial act, occurred on Monday when it was published.

BANKRUPTCY—BAILMENTS—LEASE WITH OPTION OF PURCHASE.—The plaintiff delivered machinery to the bankrupt under a nominal contract of lease containing an option to purchase for an additional sum. The bankrupt thereupon gave notes for all rental instalments and the final optional payment. *Held,* the transaction was a bailment and hence enforcible against the trustee in bankruptcy. *Walton* v. *Tepel* (C. C. A. 3rd Cir. Pa. 1913) 210 Fed. 161.

Although a transaction assumes the form of a lease, if a permanent transfer of the property is contemplated, the rights of creditors will not be prejudiced by giving effect to a secret reservation of title in the vendor. *Harvey* v. *Rhode Island Locomotive Works* (1876) 93 U. S. 664. It is of the essence of a bailment, however, that there be an intent to return the identical property in the same or altered form, and not, as in a sale, some other thing of value. 1 Loveland, Bankruptcy, 836. When, therefore, the stipulated rental payments aggregate the value of the leased property and are to be substituted for it, a sale is shown to have been intended. *Murch* v. *Wright* (1868) 46 Ill. 487; *Whitcomb* v. *Woodworth* (1882) 54 Vt. 544. But while the mere annexation of an option to purchase, *McCall* v. *Powell* (1879) 64 Ala. 254, or the acceptance of notes for the rental payments, *Unitype Co.* v. *Long* (C. C. A. 1906) 143 Fed. 315, would not alone change the character of the bailment, the fact that at the time of the transaction the vendor gave a note for the optional payment would be the strongest evidence that a conditional sale was intended. *Hays* v. *Jordan* (1890) 85 Ga. 741. The decision in the principal case would seem to result from the attitude of the Pennsylvania courts, which, by reason of their unfortunate refusal to recognize the validity of conditional sales, see *Harkness* v. *Russell* (1886) 188 U. S. 663, have upheld virtually the same arrangements as bailments. See *Stiles* v. *Seaton* (1901) 200 Pa. 114; *Enlow* v. *Kline* (1875) 79 Pa. 488. Since this tendency actually affords support to an attempt to evade the law of that jurisdiction, see *In re Poore* (D. C. 1905) 139 Fed. 862, as was pointed out by the lower court in the principal case, *In re Gaglione* (D. C. 1912) 200 Fed. 81, it can scarcely be justified.

BANKRUPTCY—PREFERENCES—RECORDING WITHIN FOUR MONTHS.—A preferential conveyance of real estate was executed more than four months before bankruptcy, but recorded within that time. *Held,* a voidable preference. *Carey* v. *Donohue* (C. C. A. 6th Cir. 1913) 209 Fed. 328. See Notes, p. 440.

BANKS AND BANKING—DIRECTORS—NEGLIGENCE.—The directors of an insolvent bank had left practically the entire management of its business to an embezzling cashier. *Held,* the receiver could recover from them the amount of the defalcation. *Lyons* v. *Corder* (Mo. 1913) 162 S. W. 606.

While some courts in the absence of statute hold bank directors liable only for negligence so gross as to amount to bad faith, see *Swentzel* v. *Penn Bank* (1892) 147 Pa. 140, 152, and others require them to exercise the care of a prudent man in his own business, *Fisher* v. *Parr* (1901) 92 Md. 245, 265, the majority of courts refrain from defining the exact amount of care required, but state broadly that they must act reasonably and prudently, *Mason* v. *Moore* (1906) 73 Oh. St. 275; *Briggs* v. *Spaulding* (1891) 141 U. S. 132, allowing the circumstances of each case and a comparison with the conduct of reasonable men in the directorate of banks similarly situated, *Wheeler* v. *Aiken Co.* (C. C. 1896) 75 Fed. 781, 784, to determine whether the requirement has been satisfied. And, indeed, many courts ostensibly applying the "gross negligence" test are in substantial accord with this position. See *Assignees* v. *Caperton* (1888) 87 Ky. 306; *Hun* v. *Cary* (1880) 82 N. Y. 65. This solution, moreover, seems preferable

to the rule which requires a director, who generally serves gratuitously, and is frequently a busy man of affairs, to give the same attention to the bank's business that he does to his own, or to the view which by exonerating him from all but the most culpable negligence loses sight of the representation he makes in lending his name to the office. See *Holmes* v. *McDonald* (1907) 126 Ill. 169. But at the suit of a creditor or depositor some courts hold the director only to good faith, although they require him to respond to the corporation for ordinary negligence. See *Deadrick* v. *Bank* (1897) 100 Tenn. 457, 463. While non-compliance with a statute was, in the principal case, regarded sufficient negligence to make the directors liable, the decision was also rested on their common law duty to use ordinary care in selecting and supervising their agent. See *Warner* v. *Penoyer* (C. C. A. 1898) 91 Fed. 587; *Briggs* v. *Spaulding, supra.*

BANKS AND BANKING—DOUBLE LIABILITY OF STOCKHOLDERS—LIMITATION OF ACTIONS.—The executors of a holder of shares in a national bank, without requiring a refunding bond from the legatees, distributed the estate in 1892, two years subsequent to the testator's death. The bank having become insolvent in 1890, the Comptroller of the Currency in 1893 ordered an assessment on the stockholders under U. S. Rev. Stat. § 5151, and ordered a second assessment in 1900. In a suit against the executors by the receiver of the bank in 1902 on the second assessment, *held,* the action was not barred by the three year Statute of Limitations of the State. *Rankin* v. *Miller* (D. C. Del. 1913) 207 Fed. 602.

Where the accrual of a cause of action is dependent upon some preliminary act wholly within the control of the plaintiff, he may not delay unreasonably in causing the right of action to vest. *West* v. *Bank* (1903) 66 Kan. 524. Consequently, although the double liability of a bank stockholder, which is contingent upon the levying of an assessment, *Aldrich* v. *Skinner* (C. C. 1899) 98 Fed. 375, does not give rise to a cause of action until such levy, actions by the receivers of state banks have nevertheless been held barred on grounds of undue delay by them in levying the assessment. *West* v. *Bank, supra.* Since, however, the receiver of a national bank cannot bring suit prior to the making of an assessment by the federal Comptroller, see *Kennedy* v. *Gibson* (1869) 8 Wall. 498, 505, or by a court of equity, see *King* v. *Pomeroy* (C. C. A. 1903) 121 Fed. 287, any delay in the accrual of the action is not due to the plaintiff's *laches, Aldrich* v. *Yates* (C. C. 1899) 95 Fed. 78, since he has no power to control the proceedings of the Comptroller or of the equity court, and as a result it would seem that the stockholder cannot avail himself of any amount of such delay as a defense. *Deweese* v. *Smith* (C. C. A. 1901) 106 Fed. 438; *Rankin* v. *Barton* (1905) 199 U. S. 228, reversing (1904) 69 Kan. 629; but see *Price* v. *Yates* (C. C. 1879) 19 Fed. Cas. No. 11,418; 1 Bolles, Banks & Banking, 174. Since the plaintiff has been deprived of his claims against the estate through the negligence of the executors, who had notice of the bank's insolvency in ample time, such executors were properly held liable as on a *devastavit* for not awaiting the action of the Comptroller before distributing the estate. See 1 Bolles, Banks & Banking, 176. The defendants could have protected themselves by requiring a refunding bond from the distributees, but their neglect in failing to do so does not affect the clear rights of the creditors.

CARRIERS—STATE REGULATION OF REDUCED RATE TICKETS.—The practice of a carrier being to require holders of mileage books to exchange their coupons for ordinary tickets before boarding trains, the Georgia Railroad Commission, after hearings, ordered that mileage books should be accepted by conductors directly on trains, except when the journey was commenced in cities of over ten thousand inhabitants, where the former practice should continue. *Held,* a valid exercise of the police power for the public convenience. *Railroad Commission* v. *Louisville & N. R. R.* (Ga. 1913) 80 S. E. 327. See Notes, p. 442.

CONFLICT OF LAWS—CORPORATIONS—INDIVIDUAL LIABILITY OF A STOCKHOLDER.—The plaintiff is a creditor of an insolvent corporation, incorporated in Arizona for the express purpose of doing business in California. Under the law of Arizona and by express stipulation of the shareholders, they are to be exempt from individual liability. The constitution and code of California, however, assume to attach such liability to shareholders in both domestic and foreign corporations. The suit was originally instituted in New York against the defendant, who is a shareholder in the corporation and a resident of New York. *Held,* one judge dissenting, the defendant was liable. *Thomas* v. *Matthiessen* (1914) 34 Sup. Ct. Rep. 312, reversing 192 Fed. 495.

Although the character of the relation existing between the shareholder and the corporation has been a much mooted question, the Supreme Court seems to regard it as one of agency, and finds an implied authority from the shareholder as principal to the corporation as agent to enter into contracts in California, and consequently to bind him, thereby, according to the laws of that State. The exact facts presented do not appear to have ever arisen before. In reaching its conclusion, however, the court follows directly the reasoning in *Pinney* v. *Nelson* (1901) 183 U. S. 144, although in that case there was not an express stipulation for exemption. For an extensive discussion of the principles involved, see 9 Columbia Law Rev. 285, 492; 10 *ibid.* 283, 520; 12 *ibid.* 450.

CONSTITUTIONAL LAW—ELEVENTH AMENDMENT—FEDERAL JURISDICTION UNDER FOURTEENTH AMENDMENT.—The complainant sought an injunction to restrain certain officers of a State from taking any action to enforce payment of taxes based upon an assessment alleged to be in violation of the Fourteenth Amendment, although made under constitutional statutes. *Held,* the federal courts had jurisdiction. *Louisville & N. R.* v. *Bosworth* (D. C. Ky. 1913) 209 Fed. 380. See Notes, p. 436.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—PROBATE OF WILLS.—The testator died in Texas, leaving personal property there and real property in Louisiana, and his will was admitted to probate in Texas. On application for registration, the Louisiana court held that the Texas court had no jurisdiction to probate the will, since the testator died domiciled in Louisiana. *Held,* this was not violative of the "full faith and credit" clause. *Burbank* v. *Ernst* (1914) 34 Sup. Ct. Rep. 299.

The court of the domicile of the testator generally has original jurisdiction over the probate of a will, Story, Conflict of Laws (8th ed.) § 518, and the validity of the will is determined by the law of the domicile. See Schouler, Wills and Administration, 393; *Nat* v. *Coons*

(1847) 10 Mo. 543. Since "full faith and credit" does not prevent an inquiry into the jurisdiction of the court rendering the judgment, Story, Conflict of Laws (8th ed.) § 609; *Andrews* v. *Andrews* (1903) 188 U. S. 14, 35, the Louisiana court was competent to question the domicile of the testator, and accordingly, the jurisdiction of the Texas court to allow probate. The court, however, might well have placed the decision on the ground that the court of the State where real property is situated has the power to grant original probate as to such property, see *Estate of Clark* (1905) 148 Cal. 108, on the acknowledged principle that the disposition of property is governed by the law of the *situs*. Page, Wills, § 28; see *Still* v. *The Corporation* (1860) 38 Miss. 646. Accordingly, the probate of a will in another State clearly has no validity in respect to such property, *M'Cormick* v. *Sullivant* (1825) 10 Wheat. 192; *Robertson* v. *Pickrell* (1883) 109 U. S. 608, except where through comity the State chooses to recognize it. See *Crippen* v. *Dexter* (1859) 79 Mass. 330. Moreover, this is not violative of "full faith and credit", Gardner, Wills, § 100; *Bowen* v. *Johnson* (1858) 5 R. I. 112, inasmuch as the contrary holding could be reached only by giving the laws of a State extra-territorial operation.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—FEDERAL POLICE POWER.—The defendant was indicted under the White Slave Act for transporting women for immoral purposes by an interstate electric railway line. He defended on the ground that the act applies only to transportation by common carriers. *Held,* the defense was not good. *Wilson* v. *United States* (1914) 34 Sup. Ct. Rep. 347. See Notes, p. 429.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—INTOXICATING LIQUORS.—The defendant railroad in conformity with the Webb-Kenyon Act refused to accept for interstate transportation intoxicating liquor intended for use in "dry" territory. *Held,* mandamus refused, since the Act was not so clearly unconstitutional that a federal court of original jurisdiction should declare it so and require defendant to violate it. *United States* v. *Oregon-Washington etc. Co.* (D. C. Ore. 1913) 210 Fed. 378.

For a discussion of the constitutionality of this statute see 14 Columbia Law Rev. 330.

CORPORATIONS—PROMOTERS—REMUNERATION.—A promoter brought suit against a corporation for services performed in the organization thereof. *Held,* he could not recover. *Cushion Heel Shoe Co.* v. *Hartt* (Ind. 1914) 103 N. E. 1063.

A corporation is under no contract obligation to its promoters for services performed in its behalf prior to its organization, *Marchand* v. *Loan & Pledge Assn.* (1874) 26 La. Ann. 389; *Rockford etc. R. R.* v. *Sage* (1872) 65 Ill. 328, since the work of the promoter, from its very nature, is done before the corporation comes into existence, see *Hall* v. *Vermont & Mass. R. R.* (1856) 28 Vt. 401, and the fact that the corporation later promised him compensation would not change the situation, *Melhado* v. *Porto etc. Ry.* (1874) L. R. 9 C. P. 503, since this promise was made without consideration. On the other hand, a recovery by the promoter on the theory of a *quantum meruit* would seem unjustifiable, *Melhado* v. *Porto etc. R. R., supra,* since promoters' services are presumed not to have been performed for a present compen-

sation, but rather to assist in the organization of the corporation in the hope of sharing in the future profits thereof, *Rockford etc. R. R.* v. *Sage, supra;* but see *Farmers' etc. Bank* v. *Smith* (1899) 105 Ky. 816, and the reception of benefits is not an unjust enrichment since the services in question were not performed at the request of the corporation. A practical argument for this view is that subsequent *bona fide* stockholders should not be compelled to take their stock subject to claims of promoters against the corporation. See *Rockford etc. R. R.* v. *Sage, supra.* Nevertheless, a few jurisdictions allow a recovery where the corporation received the benefit of the promoter's efforts if he made them in the expectation of receiving compensation, *Farmers' etc. Bank* v. *Smith, supra;* see *Low* v. *Conn. etc. R. R.* (1864) 45 N. H. 370, but these holdings would not seem to accord with the principles outlined above. Moreover, no question of injustice can arise under the majority view, since the promoter may always recover against those who requested him to perform the services. 1 Thompson, Corporations (2nd ed.) § 87; see Huffcut, Agency (2nd ed.) 234.

CORPORATIONS—PURCHASE OF ITS OWN SHARES OUT OF SURPLUS PROFITS —PROMISSORY NOTE IN PAYMENT.—A solvent corporation bought its own stock and gave a note for the purchase price. When the note matured the corporation was insolvent. *Held,* payment was postponed to general creditors. *Matter of The Fecheimer-Fishel Co.* (C. C. A. 1914) N. Y. L. J., March 16, 1914.

There is a great conflict of authority as to the right of a corporation to purchase its own stock. See 7 Columbia Law Rev. 346. The rule in New York, where the principal case arose, looks primarily to the protection of creditors, see N. Y. Stock Corp. Law § 28, and it would seem that creditors have no right to complain so long as the capital, on which they are presumed to rely, is kept intact. See *Joseph* v. *Raff* (N. Y. 1903) 82 App. Div. 47. Since the purchase did not encroach upon the capital at the time it was made, it would seem that a valid debt was created, which the note is simply a promise to pay. The situation, indeed, bears a close analogy to the case of the declaration of dividends by a corporation; for, although as a general rule dividends can be declared only out of the surplus profits, N. Y. Stock Corp. Law § 28, it has been held that if a surplus exists at the time of the declaration the relation of debtor is created *ab initio, King* v. *The Paterson & Hudson River Ry.* (1861) 29 N. J. L. 504, and nothing subsequently occurring can alter the right of a shareholder to come in as a general creditor. See *Lowene* v. *American Ins. Co.* (N. Y. 1837) 6 Paige 482; *Hunt* v. *O'Shea* (1899) 69 N. H. 600. The language of the penal law, however, is much more stringent, N. Y. Penal Law § 664, and this would, perhaps, justify the holding of the principal case, inasmuch as the note really binds the capital stock, and hence may be considered an attempt on the part of the corporation "to apply any portion of the funds of such corporation, except surplus profits, directly or indirectly to the purchase of shares of its own stock." If this is the true construction of the statute, there is no injustice in holding the plaintiff to have taken the note at his peril as to the legal consequences. It may well be doubted, however, that the legislature intended by a provision contained in the penal law, to impose such a limitation upon the power of the corporation as delineated in the corporation law. It is, accordingly, submitted that it would be a justifi-

able interpretation, which would at the same time sufficiently protect creditors, to hold that the corporation can purchase, if, at the time, it has a sufficient surplus on hand to meet the purchase price; and this, irrespective of the manner in which it chooses to pay for the same.

CRIMINAL LAW—CONDITIONAL PARDONS—RIGHT TO REVOKE.—The appellant, who had been convicted of a felony and sentenced to life imprisonment, was granted a conditional pardon; subsequently, without any allegation that the conditions had been violated, the governor revoked the pardon because after-discovered evidence led him to believe that clemency was ill-advised. *Held,* a conditional pardon is as absolute an act upon the conditions named as an unconditional pardon, and cannot be revoked except for a violation of the conditions. *Ex parte Rice* (Tex. 1914) 162 S. W. 891.

While it is generally recognized that where a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions imposed, the effect is the same as though the pardon were absolute, see *Ex parte Alvarez* v. *State* (1905) 50 Fla. 24, there is some conflict as to the correct method of procedure for determining whether or not a breach of the conditions has occurred. Some courts have held this a question of fact which may be properly submitted to a jury; *People* v. *Burns* (N. Y. 1894) 77 Hun 92, affirmed (1894) 143 N. Y. 665; and others have even held a jury trial in such case a matter of right. *People* v. *Moore* (1886) 62 Mich. 496. However, the established practice seems to be that in the absence of statute or express terms in the pardon placing the power of recommitment in the governor, the convict is entitled to a hearing before a court of general criminal jurisdiction, but is not entitled to a jury trial as a matter of right, unless to determine whether he is the person who was convicted. *State* v. *Horne* (1906) 52 Fla. 125; *State* v. *Wolfer* (1893) 53 Minn. 135. On the other hand, in cases where a summary power of revocation has been conferred on the governor either by statute or by the express terms of the pardon, it is generally admitted that the prisoner may be reconfined without judicial proceedings. *Ex parte Houghton* (1907) 49 Ore. 232; *Fuller* v. *State* (1898) 122 Ala. 32; see *Woodward* v. *Murdock* (1890) 124 Ind. 439. But, although the courts are not entitled to review discretionary acts of the governor, see *In re Moyer* (1905) 35 Colo. 159, nevertheless, where, as in the principal case, the pardoning power avowedly revokes a pardon for reasons other than breach of its conditions, the question is one of jurisdiction rather than of discretion, and seems a proper subject for review by habeas corpus by a court of general criminal jurisdiction. See 13 Columbia Law Rev. 754.

DEEDS—CONDITIONAL DELIVERY—DELIVERY TO THIRD PARTY TO HOLD UNTIL GRANTOR'S DEATH.—A executed a deed to the plaintiff and delivered it to a third party to transfer to the plaintiff upon the grantor's death. Later, A attempted to recall the deed, and then conveyed the property to the defendant. *Held,* title was absolute in the plaintiff upon A's death. *Dickson* v. *Miller* (Minn. 1914) 145 N. W. 112.

It is well settled that delivery of a deed to a depositary to be given to the grantee after the lapse of a certain time or upon the happening of some certain event, such as the death of the grantor, is sufficient to pass title to the grantee. *Grilley* v. *Atkins* (1905) 78 Conn. 380; *Hathaway* v. *Payne* (1865) 34 N. Y. 92. But for this to be true, the grantor must relinquish all control over the deed. *Renehan* v.

McAvoy (1911) 116 Md. 356; *Long* v. *Ryan* (Cal. 1913) 137 Pac. 29; *contra, Lippold* v. *Lippold* (1900) 112 Iowa 134. In such cases, many courts, following strictly the general rule that no delivery of a deed passes title unless the deed is accepted by the grantee, 1 Devlin, Deeds (3rd ed.) § 285, hold that actual acceptance by the grantee must be proved in order for title to pass. *Bell* v. *Farmers' Bank* (Ky. 1874) 11 Bush 34; see *Hibberd* v. *Smith* (1885) 67 Cal. 547. But the weight of reason and authority seems to support the view that if the deed is beneficial to the grantee his acceptance will be presumed at the time of delivery even though he knows nothing of the transaction and has given no authority to the depositary. 1 Devlin, Deeds (3rd ed.) §§ 286-289. The chief source of conflict on this subject is the question as to when title passes to the grantee. According to one theory, title passes to him immediately upon delivery to the depositary. 26 Harvard Law Rev. 565, 575. A second theory is that title passes upon the death of the grantor, but that the deed is delivered at the time when it is given to the depositary, and is therefore entitled to priority over all subsequent conveyances except those to a *bona fide* purchaser for value. 14 Columbia Law Rev. 389, 405. But the majority of courts appear, in words at least, to adhere to the doctrine laid down by Shaw, C. J., in *Foster* v. *Mansfield* (Mass. 1841) 3 Metc. 412, that the deed will not take effect until delivery to the grantee, but will then relate back to the time of delivery to the depositary unless injustice would thereby be done to some third party. *Emmons* v. *Harding* (1903) 162 Ind. 154; *Stonehill* v. *Hastings* (1911) 202 N. Y. 115; *Stephens* v. *Rinehart* (1872) 72 Pa. 434.

Evidence—Habit—Admissibility to Show Negligence.—In an action for a collision between the plaintiff's horse and the defendant's buggy on the highway, the defendant introduced evidence that the plaintiff's son, who was riding the horse, habitually drove it at a high rate of speed at the place of the accident. *Held,* admissible. *Hodges* v. *Hill* (Mo. App. 1913) 161 S. W. 633.

Evidence of a person's custom or habit should be distinguished, on the one hand, from character evidence, with which it is often confused, see 1 Wigmore, Evidence, §§ 65, 92, and on the other hand, from the inadmissible evidence of other specific acts. *Maguire* v. *Railroad* (1874) 115 Mass. 239; *Calcaterra* v. *Iovaldi* (1906) 125 Mo. App. 347. Although habit evidence is of no value to prove intent, see *State* v. *Railroad* (1873) 52 N. H. 528, 549; *Craven* v. *Central Pacific R. R.* (1887) 72 Cal. 345, since a party's state of mind is dependent rather upon his character, see 14 Columbia Law Rev. 353, than on his purely mechanical habits, it nevertheless becomes of importance and has been held admissible in negligence cases, *Sheldon* v. *Hudson River R. R.* (1856) 14 N. Y. 218; *Shaber* v. *Railroad* (1881) 28 Minn. 103; *Craven* v. *Central Pacific R. R., supra,* as tending to prove the greater likelihood of the party's having done the act in issue, see *State* v. *Railroad, supra,* particularly where the other evidence is conflicting. *Shaber* v. *Railroad, supra.* The weight of authority, however, excludes habit evidence even in negligence cases, *Louisville & N. R. Co.* v. *McClish* (C. C. A. 1902) 115 Fed. 268; *Whitney* v. *Gross* (1885) 140 Mass. 232; *Baker* v. *Irish* (1895) 172 Pa. 528, on the assumption that, since it is a collateral issue, which would tend to divert the attention of the jury, and which the defendant would be unprepared to rebut, its admission would beget uncertainties and false issues. Accordingly, when there

is direct evidence as to what took place, see *Zucker* v. *Whitridge* (1912) 205 N. Y. 50, it is best to exclude habit evidence, which is, at most, only inferential; where, however, there is no direct evidence on either side, it would be well to accept the very practical and satisfactory compromise adopted in Illinois, *Salem* v. *Webster* (1901) 192 Ill. 369; *Railroad* v. *Clark* (1883) 108 Ill. 113, where, under such circumstances, habit evidence is received.

EVIDENCE—PROOF OF HANDWRITING BY COMPARISON—TESTAMENTARY COMMON LAW.—In a probate proceeding documents written by the testator were offered in evidence for the purpose of comparison with his subscription, although they were otherwise irrelevant. *Held,* admissible by the "testamentary common law", confirmed by Code Civ. Proc., § 961, d. *In re Smart's Will* (N. Y. Surr. Ct. 1914) 145 N. Y. Supp. 839.

Following the civil law rule on the subject, the English Ecclesiastical Courts admitted in evidence writings otherwise irrelevant for the purpose of comparison, see 62 L. R. A. 829, but even there this class of evidence, though never wholly barred, came to be viewed with disfavor. See *Robson* v. *Rocke* (1824) 2 Add. Eccl. Rep. 57, 86; *Crisp* v. *Walpole* (1829) 2 Hagg. Eccl. Rep. 531, 535. This may be ascribed to the influence of the stricter rule which was developing in the common law courts, that comparison might not be made unless the writing was already in the case for some other purpose, see 2 Columbia Law Rev. 39, 42; 10 *ibid.* 774, and it is therefore difficult to say what weight would be given to such evidence now, if the "testamentary common law" only were to be considered. In this country, indeed, the common law rule of the jurisdiction certainly prevails wherever probate causes are tried before juries. *Fee* v. *Taylor* (1885) 83 Ky. 259; *Matter of Foster's Will* (1876) 34 Mich. 21; *Snider* v. *Burks* (1887) 84 Ala. 53. Even in New York, where the Surrogate's practice may be said to bear some resemblance to that in the ecclesiastical courts where the civil law rule was applied, a predecessor of the present Surrogate of New York County refused to receive irrelevant writings "for the mere purpose of comparison". *In re Merchant's Will* (N. Y. 1864) 1 Tucker 151, 177. He was undoubtedly influenced by the common law rule of the time. See *Dubois* v. *Baker* (1864) 30 N. Y. 355, 362, 366. The subject in New York at the present time is only of historical interest, however, as proof of handwriting by comparison has received statutory sanction, Code Civ. Proc. § 961(d), and these statutes have been applied in Surrogates' Courts. See *Peck* v. *Callaghan* (1884) 95 N. Y. 73.

FOREIGN CORPORATIONS—INTERSTATE COMMERCE—STATE INTERFERENCE.—A statute provided that any corporation transacting business in Oklahoma should be deemed to be domiciled in that State, and if foreign residence should be claimed for the purpose of removing into the federal courts a suit brought against the corporation, it should be the duty of the Secretary of State to revoke the license of the corporation to do business within the State. *Held,* the statute was unconstitutional in its application to a foreign railway corporation. *Harrison* v. *St. Louis & S. F. R. R.* (1914) 34 Sup. Ct. Rep. 333.

A corporation is a citizen for the purpose of suing and being sued only of the State which charters it, and a compliance with the terms of a foreign statute not amounting to a new incorporation will not change or prejudice its rights flowing from this citizenship. *St. Louis*

& S. F. Ry. v. *James* (1896) 161 U. S. 545; *Shaw* v. *Quincy Mining Co.* (1892) 145 U. S. 444. The court recognized that the statute in the principal case was aimed to place foreign corporations on an equality with domestic corporations in respect to their right of removal, but affirmed the doctrine that the constitutional privileges of foreign corporations are immune from state interference. See *Western Union Tel. Co.* v. *Kansas* (1910) 216 U. S. 1; *Southern Pacific Co.* v. *Denton* (1892) 146 U. S. 202. It must be noted, however, that in the principal case, the state action did not and could not prevent the particular act of removal in question. *Southern Ry.* v. *Allison* (1903) 190 U. S. 326. And although the effect of the attempted forfeiture would indirectly have been to deprive the corporation of its constitutional right, yet if a State has power to prevent a foreign company from doing business at all within its borders, the motives prompting the exercise of its power may not be questioned. *Doyle* v. *Continental Life Ins. Co.* (1876) 94 U. S. 535; *Security Mut. Life Ins. Co.* v. *Prewitt* (1906) 202 U. S. 246; see 5 Columbia Law Rev. 231. Consequently, had the corporation been engaged solely within the State, or had its local business been separable from its foreign business, see 14 Columbia Law Rev. 434, the appellee in the principal case would have had no remedy for the denial of the right to engage in intrastate commerce, despite the consequential loss of its right of removal. *Waters-Pierce Oil Co.* v. *Texas* (1900) 177 U. S. 28. The test of the constitutionality of such a provision for forfeiture would therefore seem to be not its effect in indirectly denying the right of removal but whether it amounts to a burden on interstate commerce.

FOREIGN CORPORATIONS—STATE TAXATION—LICENSES.—A mining corporation, organized and having its principal place of business in Michigan, maintained an office for its officers, directors' meetings, and stock transfers in Massachusetts, but its only property in the State consisted of current bank deposits and a certificate of stock in another foreign corporation. All of its sales were consummated through a New Jersey sales company. Another foreign corporation maintained a branch sales office in Boston, accepting orders for delivery in New England. Its stock on hand, bank deposits, and leasehold interests in Massachusetts amounted to $100,000. Both sued to recover taxes paid under a Massachusetts statute assessing "an excise tax * * * of one-fiftieth of one per cent. of the par value of the authorized capital stock" of foreign corporations, the amount being limited in any one year to the sum of $2,000. *Held,* the tax was constitutional. *Baltic Mining Co.* v. *Massachusetts* and *White Dental Mfg. Co.* v. *Massachusetts* (1914) 231 U. S. 68. See Notes, p. 434.

HOMESTEADS—INSURANCE—GARNISHMENT OF PROCEEDS.—In a suit to collect the insurance on a homestead, a creditor of the plaintiff's, who had received the money from the insurance company under garnishment proceedings, was made a defendant. *Held,* the statute exempting homesteads from garnishment extended to the claim. *Johnson* v. *Hall* (Tex. 1914) 163 S. W. 399.

Although the right to the exemption of the homestead from liability for debts is purely statutory, *Sayres* v. *Childers* (1901) 112 Ia. 677, there has been a considerable tendency to construe the statute liberally in favor of the debtor. See *Krueger* v. *Pierce* (1875) 37 Wis. 269. Thus, in order that the purpose to provide homes for citizens may be better

accomplished, see *Jacobs* v. *Smallwood* (1869) 63 N. C. 112; *Wassell* v. *Tunnah* (1867) 25 Ark. *101, it has been held that the proceeds of a voluntary sale are exempt when there is a *bona fide* intention to reinvest the money in another homestead, *State ex rel. Schneider* v. *Hull* (1903) 99 Mo. App. 703, and in some jurisdictions even such intention is unnecessary. *Locke* v. *Post* (1899) 71 Vt. 343. When, therefore, the loss is involuntary, as in the principal case, the same general policy which underlies the homestead exemption statutes makes it desirable to extend their application, and the conclusion is in conformity with the general view. *Chase* v. *Swayne* (1895) 88 Tex. 218; 1 Freeman, Executions (3rd ed.) 819; but see *Wooster* v. *Page* (1873) 54 N. H. 125. Nevertheless it is apparent that in garnishing the insured's claim against the company the creditor attached the personal contract right to indemnity and not the demolished house or the proceeds thereof, *Smith* v. *Ratcliff* (1889) 66 Miss. 683; *Wooster* v. *Page, supra,* and it may well be argued that in interpreting the statute in so liberal a manner the court is guilty of positive legislation. *Smith* v. *Ratcliff, supra;* see *Meyers* v. *Supreme Lodge K. & L. H.* (1897) 72 Mo. App. 350.

JUDGMENTS—RIGHT OF SET-OFF AGAINST AN ASSIGNEE FOR VALUE.—After the rendering of judgment in a contract action against B in favor of A, another judgment was rendered in a tort action against A in favor of B, who later assigned one-half interest in the latter to the defendant for value. A now asks for an injunction to restrain the defendant from collecting. *Held,* since the defendant had no notice of A's right against B, and inasmuch as B was not shown to be insolvent, A had not a right of set-off against the defendant. *Davidson* v. *Lee* (Tex. 1913) 162 S. W. 414.

Judgments, irrespective of the cause of action upon which they are founded, represent claims for liquidated damages and are essentially debts. *Mayor & Council of Anniston* v. *Hurt* (1903) 140 Ala. 394. Moreover, since it is difficult to conceive of a judgment as negotiable, an assignment thereof, like the assignment of any other non-negotiable chose in action, should subject the assignee to all the defenses and equities which exist against the assignor at the time of the assignment. *Noble* v. *Thompson Oil Co.* (1875) 79 Pa. 354; *Rider* v. *Kelso* (1880) 53 Iowa 367. And although it is generally held that a *bona fide* assignee takes free from latent equities in favor of third parties, *Starr* v. *Haskins* (1875) 26 N. J. Eq. 414; *Williams* v. *Donnelly* (1898) 54 Neb. 193; *contra, Schafer* v. *Reilly* (1872) 50 N. Y. 61, yet, when the equity exists in favor of the obligee, no valid reason appears why such equity should not prevail. *Noble* v. *Thompson Oil Co., supra; Yarnell* v. *Brown* (1895) 65 Ill. App. 83; see 12 Columbia Law Rev. 152. Nevertheless in respect to the requirements which are necessary to make a judgment claim against the assignor good as a set-off against an assignee without notice there is some conflict, 2 Black, Judgments (2nd ed.) § 954, which is apparently due to an uncertainty in respect to the exact status of a judgment. Thus the court in the principal case, in fixing the solvency of the assignor as the determining test, seems to place this status in an anomalous position somewhere between that of a negotiable and a non-negotiable chose in action. However, in view of the usually accepted conception that a judgment is non-negotiable this test is scarcely logical or in line with the weight of authority.

LIBEL AND SLANDER—LIBEL CONTAINED IN A WILL—RIGHT TO DAMAGES AGAINST THE ESTATE.—In a suit to recover damages against the executor on account of a libel against the plaintiff contained in the decedent's will and published by the probate of said will, *held,* since the cause of action arose after the testator's death, the maxim *"actio personalis cum persona moritur"* did not apply, and therefore the plaintiff could recover. *Harris* v. *Nashville Trust Co.* (1914) 162 S. W. 584.

If the plaintiff had complained of the publication made during the lifetime of the testator by the dictation to a stenographer, the rule of law that personal actions abate at the death of the wrongdoer would apply. Under the pleadings of the principal case, however, the only publication involved is the one made by the probate. This surely does not render the executor liable, since he is conditionally privileged, and moreover, he would be criminally answerable if he withheld the will from probate. There is obviously no cause of action against the estate, since publication, one of the essential elements in an action for libel, is lacking during the lifetime of the testator, and therefore the tort was completed, if at all, only after his death. While in the principal case the plaintiff might have proceeded against the testator during his lifetime, for the publication to the stenographer and thus have been compensated for that libel against him, in the case of a holographic will some remedy ought to be afforded the plaintiff since in such case there is not even a cause of action in the lifetime of the tort-feasor. Although the decision in the principal case is not without precedent, *In re Gallagher,* 15 Harvard Law Rev. 483, it seems impossible to justify it by identifying the estate with the testator for the purposes of this action, without upsetting the established principles of tort liability.

MANDAMUS—OTHER ADEQUATE REMEDY AS BAR—REMEDY IN EQUITY.—The plaintiff sought a peremptory writ of mandate commanding a defunct corporation to execute a deed to him. *Held,* the writ should be denied as there was a more appropriate remedy in the equity jurisdiction of the court over the directors as trustees. *Turney* v. *Morrissey* (Cal. 1913) 134 Pac. 335.

The writ of mandamus was originally a prerogative writ, see *King* v. *Barker* (1762) 1 W. Black. 352, but in the United States it has generally been demandable as of right wherever there was a violation of a clear legal right wihin its scope, *cf. Insurance Co.* v. *Mayor* (1865) 23 Md. 296, and no other adequate remedy existed at law. See *Commonwealth* v. *Dennison* (1860) 24 How. 66; *cf. People* v. *Weber* (1877) 86 Ill. 283. It would follow from its origin as a writ supplemental to legal remedies, before the development of equity, see High, Extraordinary Legal Remedies (3rd ed.) §2, that the existence of a like or more effective remedy in equity should have no bearing upon this jurisdiction of a court of law. It appears, however, that a specific statutory remedy, although exercisable only in equity, always conclusively barred the mandamus jurisdiction, *State* v. *Railroad* (1882) 62 N. H. 29; see *King* v. *Barker, supra,* and it has been held that the existence of any adequate equitable remedy had the same effect. *State* v. *Hartford St. Ry.* (1903) 76 Conn. 174; *contra, State* v. *Chicago etc. R. R.* (1891) 79 Wis. 259; *cf. State* v. *Carpenter* (1894) 51 Oh. St. 83. The weight of authority, however, holds that the jurisdiction of the court of law is unaffected by the existence of the equitable remedy

but nevertheless that sufficient of the writ's prerogative nature has been retained so that its issue in view of such equitable remedy is a matter of sound discretion for the court. *People* v. *N. Y. C. & H. R. R.* (1901) 168 N. Y. 187; *cf. T. & B. C. R. R. v. Iosco* (1880) 44 Mich. 479.

PLEDGES—SURRENDER OF POSSESSION TO OWNER—LOSS OF LIEN.—A pledgee of stock returned it to the pledgor at his request, for the special purpose of having the title transferred to the latter's son as trustee. The new certificates were at once turned over to the pledgee. *Held,* the pledgee did not thereby lose his lien. *Hickok* v. *Cowperthwait* (1913) 210 N. Y. 137.

It is well settled that where one voluntarily delivers possession of pledged property without any qualification and without insisting on payment it is a release or waiver of any security he may have upon such property. Hence, if the pledgee retransfers the pledge to the owner for a special limited purpose the intention of the parties controls and his lien is not invalidated since he is still constructively in possession, the pledgor holding as his agent. 14 Columbia Law Rev. 339. If, moreover, possession of the pledge is obtained by the owner without the assent of the pledgee or by false pretenses or through any wrongful act on the part of the former, the pledgee obviously cannot be deemed to have released his lien, *American Pig Iron Storage Warrant Co.* v. *German* (1899) 126 Ala. 194; *Walcott* v. *Kieth* (1850) 22 N. H. 196; *Bruley* v. *Rose* (1882) 57 Ia. 651, and not only is he given the right to recover damages against the pledgor for conversion but he may in a proper case maintain a bill in equity to enforce his lien by a sale of the pledge. A pledgee does not forfeit his lien by making a sub-pledge, see *Meyer* v. *Moss* (1902) 110 La. 132, nor by employing the pledgor as his agent in selling the goods held in pledge, and if the latter disobeys instructions he is liable in conversion. *Hays* v. *Riddle* (N. Y. 1848) 1 Sandf. 248; *Epland* v. *Wheat* (1910) 134 Ga. 511; *Thayer* v. *Dwight* (1870) 104 Mass. 254. The principal case, therefore, seems to be perfectly sound, since the new certificates which were really issued at the direction of the pledgee might very well be considered a part of the old pledge.

POLICE POWER—RESTRICTION OF RETAIL STORES AT INSTANCE OF NEIGHBORS.—A municipal ordinance required anyone desiring to build a retail store on an exclusively residential street to file the consents of two-thirds of the adjoining property owners. *Held,* unconstitutional. *People* v. *Chicago* (Ill. 1913) 103 N. E. 609.

The court, in holding that the power to enact such an ordinance was neither enumerated nor implied in the Cities Law as an exercise of the police power for the promotion of public aesthetics, was entirely in accord with the authorities. *Chicago* v. *M. & M. Hotel Co.* (1910) 248 Ill. 264; *Sign Works* v. *Training School* (1911) 249 Ill. 436; see 27 Harvard Law Rev. 571. But it is submitted that the true purpose of the ordinance was not aesthetic, but to control the location of new store buildings under circumstances in which they are nuisances, disturbing the quiet of residence streets with the noise of trade, and disrupting property values. Since the character of a building as a nuisance ordinarily turns on detailed and unusual facts, the category of such nuisances is very specific. Broad classifications are not found, nor can they be deduced from the decisions in general terms such as

stores, factories and dwellings. On the other hand, when the fact of nuisance is once established, as in the case of a saloon, *Swift* v. *People* (1896) 162 Ill. 534, or a building line, *Eubank* v. *Richmond* (1910) 110 Va. 749, the precise method of control proposed in Chicago may be applied. Although it is generally true that the appearance of trade will exercise a deleterious effect upon a residence neighborhood, the condemnation of retail stores as a class involves a step beyond any existing decision, irrespective of local limitations. But if the fact that a store is a nuisance under certain circumstances could once be established, the police power for the general welfare could be invoked to control it.

REAL PROPERTY—RESTRICTIVE COVENANTS—CHANGE OF NEIGHBORHOOD.—In an action brought to enjoin the breach of a building-line agreement, the defendant resisted performance on the ground of a change in the character of the neighborhood. *Held,* inasmuch as the breach of the covenant would cause the plaintiff no damage and a specific performance would greatly damage the defendant, specific performance should be denied. *Batchelor* v. *Hinkle* (Ct. of Appeals, 1914) N. Y. L. J., March 9, 1914. See Notes, p. 438.

RECEIVERS—APPOINTMENT—NECESSITY OF APPLICATION.—During the pendency of an action for divorce and the partition of a community estate the court appointed a receiver to take possession of the property, although no request had been made for such appointment. *Held,* the court has power upon its own motion to appoint a receiver without an application therefor. *Crawford* v. *Crawford* (Tex. 1913) 163 S. W. 115.

The question whether a court may appoint a receiver on its own motion arises infrequently, partly because of the general reluctance of the courts to grant this ancillary relief, see Alderson, Receivers, §7; *Attorney General* v. *Council of Newark* (1911) 9 Del. Ch. 171, and partly because litigants rarely neglect in proper cases to request it. However, as in many matters pertaining to receivers, there appears to be considerable divergence. See High, Receivers (4th ed.) §§82, 83(a), 98, notes. For instance, under identical circumstances, one court has appointed a receiver without application, *San Antonio Gas Co.* v. *State* (1899) 22 Tex. Civ. App. 118, while another has refused to grant this relief at all. *Havemeyer* v. *Superior Court* (1890) 84 Cal. 327. One court, at least, though admitting the power of the Chancellor to appoint a receiver on his own motion, has declared that such action by the judge of an inferior court would be improper. See *Frazier* v. *Wilcox* (La. 1843) 4 Rob. 517, 525; *United States* v. *Bank of United States* (La. 1845) 11 Rob. 418, 433. In certain jurisdictions, it is further insisted that not only must an application be made by one of the parties, but it must be pleaded as a special prayer in the bill. *Wilson* v. *Maddox* (1899) 46 W. Va. 641; but see *Ladd* v. *Harvey* (1850) 21 N. H. 514. The preponderance of judicial opinion, however, supports the position taken in the principal case, that if it seems necessary a court may appoint a receiver upon its own motion and without application therefor. *Elk Fork Oil Co.* v. *Foster* (C. C. A. 1900) 99 Fed. 495. In short, where the facts established a proper case it is a matter wholly within the court's discretion. *McGarrah* v. *Bank of Southwestern Georgia* (1902) 117 Ga. 556.

SPECIFIC PERFORMANCE—MARKETABLE TITLE—EFFECT OF PRESUMPTION OF DEATH.—In a suit by the vendor of real property to compel specific performance, the vendee set up the defense that the plaintiff's title was dependent for its validity upon the death of one who had been absent and not heard of for 27 years. *Held,* the mere fact of absence did not raise a presumption of death sufficient to render the title marketable. *Cerf* v. *Diener* (1914) 210 N. Y. 156.

Although in a suit for specific performance a vendee is not entitled to demand a title absolutely free from suspicion, *Conley* v. *Finn* (1898) 171 Mass. 70; see 4 Pomeroy, Equity Juris., § 1405, the doctrine is well established that a court of equity will not force the purchaser to take an unmarketable title. *Nicol* v. *Carr* (1860) 35 Pa. 381; see 6 Columbia Law Rev. 56. This standard of marketability is necessarily vague, see *Pyrke* v. *Waddingham* (1852) 10 Hare 1, but the purchaser is generally permitted to demand a title which he can be reasonably sure will not expose him to the hazard of litigation. *Gill* v. *Wells* (1882) 59 Md. 492. Thus, although it is practically a universal rule that seven years' absence without tidings raises a presumption of law as to the death of the absentee, yet the fact that this presumption is rebuttable has led to the conclusion that where the validity of the title depends upon the death of such person, such absence alone is not enough to render a title marketable. *Vought* v. *Williams* (1890) 120 N. Y. 253; see *Trimmer* v. *Gorman* (1901) 129 N. C. 161. The addition of other extrinsic facts which sufficiently increase the probability of the absentee's death, will, however, remove the reasonable doubt. *Cambrelleng* v. *Purton* (1891) 125 N. Y. 610. Although every increase in the time of absence evidently enlarges this probability, and it would therefore seem that an unexplained period of 27 years might reasonably justify a conclusion either way, the decision in the principal case is in accord with the prevalent hesitancy in similar cases to give effect to the presumption of death. *Vought* v. *Williams, supra; cf. Chew* v. *Tome* (1901) 93 Md. 244.

STOCK—PLEDGES—LIABILITY OF PLEDGEE AS SHAREHOLDER.—The defendants held stock in an insolvent bank as collateral security. They appeared to be absolute owners on the stock books. *Held,* they were liable to creditors of the bank under Article VIII, Section 7, New York Constitution, imposing special liabilities upon stockholders of banking corporations. *Van Tuyl* v. *Robin et al.* (N. Y. App. Div. 1913) 145 N. Y. Supp. 121. See Notes, p. 432.

TAXATION—PERSONAL PROPERTY—SEAT IN STOCK EXCHANGE.—In an action to collect a tax on a seat in the Duluth Board of Trade under a statute declaring "all property whether real or personal subject to taxation", *held,* that such seat, being personal property, is taxable. *State* v. *M'Phail* (Minn. 1914) 145 N. W. 108.

The rights involved in the ownership of a seat in a stock exchange have been repeatedly held to be property. *Habenicht* v. *Lissak* (1889) 78 Cal. 351; *Powell* v. *Waldron* (1882) 89 N. Y. 328; see *Hyde* v. *Woods* (1876) 94 U. S. 523. Such rights seem to have all the characteristics of property, being both transferrable and of determinable value, *Nashua Savings Bank* v. *Abbott* (1902) 181 Mass. 531, and moreover, like all other property, they are assets in bankruptcy. *In re Hurlbutt* (C. C. A. 1905) 135 Fed. 504. The fact that the class of purchasers is restricted does not destroy their character as property but

merely affects their salable value. See *Page* v. *Edmunds* (1903) 187 U. S. 596, 605. Although such rights have been held to be subject to the transfer tax under a statute worded like the one under consideration, *Matter of Hellman* (1903) 174 N. Y. 254, they have generally been held not to be subject to taxation under the general taxing statutes. *State* v. *Fleitner* (1901) 167 N. Y. 1; *San Francisco* v. *Anderson* (1894) 103 Cal. 69; *Baltimore* v. *Johnson* (1903) 96 Md. 737. It has been suggested as a reason for this that to hold such rights liable would involve double taxation. *San Francisco* v. *Anderson, supra.* This, however, has not been seriously contended and would, moreover, not be a fatal objection. Although the intangibility of these rights is the usual excuse in decisions exempting them, the mere intangibility of property has been rejected as a reason for its exemption in a case where the court declared that even such an impalpable right as the good will of a business might be subject to taxation. See *Adams Express Co.* v. *Ohio* (1897) 166 U. S. 185, 221. Since all property is subject to taxation except where exempted by clear and unambiguous terms, 1 Cooley, Taxation, 356, and since seats in the stock exchange are generally conceded to be property, the principal case in stating that such rights do come within the general taxing statute, although contrary to the great weight of authority, seems to pronounce the more logical rule.

WILLS—"DYING WITHOUT ISSUE"—TO WHAT TIME REFERRED.—The testator gave, subject to a life estate, two-thirds of his real and personal property to A, "his heirs and assigns forever", and one-third to B, "her heirs and assigns forever," and in case A and B "should die without issue, the survivors to take the whole." *Held,* A and B, surviving the testator, took an absolute interest without survivorship. *Russell* v. *Furness* (1914) 145 N. Y. Supp. 402.

Where there is a devise in fee or an absolute bequest, with a gift over in case the first taker dies without issue, many courts hold the contingency operative, in the absence of a contrary intention, only by a death in the testator's life, see *Vanderzee* v. *Slingerland* (1886) 103 N. Y. 47; *Fowler* v. *Duhme* (1895) 143 Ind. 248; 8 Columbia Law Rev. 47, due partly to the desire to vest the estate as early as possible, and to the aversion against cutting down a gift of an absolute interest except by clear and explicit language. See *Fowler* v. *Duhme, supra; Benson* v. *Corbin* (1895) 145 N. Y. 351, 359. But where the contingency may be referred to a period mentioned in the will, other than the death of the testator or of the taker of the estate which is subject to the contingency, many jurisdictions refer it to such period. *Harvey* v. *Bell* (1904) 118 Ky. 512; *Burney* v. *Richardson* (Ky. 1837) 5 Dana *424, *430. The New York courts have, however, construed the clause as providing merely a substitutionary gift even where there is a prior life estate, to the termination of which the contingency might be referred. *Stokes* v. *Weston* (1894) 142 N. Y. 433. Still, the feeling that the rule is based rather on precedent than on reason, see *Vanderzee* v. *Slingerland, supra,* at page 55, and the dissatisfaction of all the judges, see *Benson* v. *Corbett, supra,* at page 362, with the rule they are applying, has led them to seize hold of slight circumstances in the will to vary the construction and to give effect to the language according to its "natural import." *Vanderzee* v. *Slingerland, supra.*